84-1257

Office - Supreme Court, U.S.
FILED
FEB 5 1985
ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court of the United States

October Term 1984

RICHARD L. GLOVER,
on behalf of himself and all others similarly situated,

Petitioner,

v.

UNITED GROCERS, INC., an Oregon corporation, et al.,*

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

GARY K. JENSEN**
Gary K. Jensen, P.C.
91 Madison Street
Eugene, OR 97402
(503) 484-1021

*** Parties are listed on next page.**
**** Counsel of Record for Petitioners**

45AP

QUESTIONS PRESENTED

1. Can the seniority provisions of a collective bargaining agreement be abrogated by a Joint Conference Board's written opinion in an unrelated grievance arbitration where the collective bargaining agreement expressly denies the Board the power to modify its terms?

2. If a collective bargaining agreement cannot be so abrogated, is an employees' class action suit seeking to have such a modification declared invalid subject to the six month limitations period announced in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)?

3. If *DelCostello* does not apply to nonarbitrated claims, what limitations period should apply?

Defendants Local No. 962 of the International Brotherhood of Teamsters, Clifford Cooper, Jack Alexander and Laythell Bales are represented by Richard R. Carney, 1618 S.W. First Avenue, Portland, Oregon 97201 (503) 221-0611. Defendant United Grocers, Inc., is represented by Nelson D. Atkin II, 800 Pacific Building, Portland, Oregon 97204 (503) 226-6151.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statute Involved 1

Statement of the Case 1

Argument 5

Discussion 6

I. It is necessary for this Court to define what an "arbitration award" is for purposes of applying the limitations period on suits to vacate arbitration awards. 6

II. This Court has not yet decided the important federal question of whether *DelCostello*'s six month limitations period should apply to nonarbitrated claims. 9

III. The question of what limitations period to apply to nonarbitrated claims is an important question of federal labor law not yet decided by this Court. 13

Conclusion 14

Appendix

District Court opinion App-1

District Court judgment App-6

Ninth Circuit opinion App-7

Labor Management Relations Act § 301
29 U.S.C. § 185 ..... App-13

Complaint App-15

Grievance App-21

Joint Conference Board decision App-22

TABLE OF AUTHORITIES

Page

Cases Cited

Clark v. Hein-Werner Corp., 8 Wisc.2d 264, 100 N.W.2d 317 (1960) 11

Crowley v. Local 82, Furniture & Piano Moving, 521 F. Supp. 614 (D. Mass. 1981), aff'd on other grounds, 679 F.2d 978 (1st Cir. 1982), rev'd on other grounds, ____ U.S. ____, 104 S.Ct. 2557 (1984) 13

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) ..... passim

Electrical Contractors Association v. Local 103, IBEW, 458 F.2d 590 (1st Cir. 1972) 12

General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963) 5

Hall v. Printing & Graphic Arts Union, Local 3, 696 F.2d 494 (7th Cir. 1982) 10

John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 8

Primakow v. Railway Express Agency, Inc., 56 F. Supp. 413 (E.D. Wisc. 1943) 11

School Committee of Boston v. Boston Teachers Union, 363 N.E.2d 485 (Mass. 1977) 5

United Steelworkers v. Flowers, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) 9

Statutes

28 U.S.C. § 2101(c) 1

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185 1

Petitioner Richard Glover respectfully requests this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in Glover v. United Grocers, Inc., No. 83-4202.

OPINIONS BELOW

The federal district court for Oregon issued an opinion and order granting the defendants' motions to dismiss this suit as time-barred. *Glover v. United Grocers, Inc.*, Civ. No. 83-6105-ME (D. Or. Sept. 13, 1983) (Belloni, J.). See Appendix at 1. [Hereafter "App."]

Glover appealed and the Ninth Circuit affirmed the district court's dismissal in an opinion reported as *Glover v. United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984) (per curiam). See App. 7.

JURISDICTION

The Ninth Circuit's opinion is dated November 8, 1984. Under 28 U.S.C. § 2101(c), Glover's petition for certiorari is due by February 7, 1985. Glover invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Labor Management Relations Act, Section 301, 29 U.S.C. § 185 is set out in the Appendix at 13.

STATEMENT OF THE CASE

Since the complaint was dismissed as time-barred, the reviewing court must assume the facts as alleged in the complaint are true. The complaint is at App. 15.

In 1980, Defendant Teamsters Local 962 and Defendant United Grocers of Medford, Oregon entered into a series of three-year, collective bargaining agreements. The agreements included a Wholesale Grocery Master Agreement and three Supplemental Agreements which provided for separate seniority lists for three different employer groups—produce warehousemen, grocery drivers, and dairy products drivers. (The separate seniority lists were established at the employer's request, not the union's.)

While the collective bargaining agreements were in effect, United Grocers requested Local 962 to merge or dovetail the three separate seniority lists into one new list. At a special meeting that the union held regarding the request, the affected employees voted 33 to 3 to oppose any dovetailing of the separate seniority lists. App. 18.

On June 7, 1982, Glover, a grocery driver, filed a grievance because the employer had sent a produce warehouseman to deliver a load that consisted predominantly of groceries. App. 18. Since Glover felt he was deprived of a driving assignment in violation of the existing collective bargaining agreement, he sought to be paid for that run. Three other drivers filed similar grievances. (However, no dairy products drivers filed grievances. App. 19.)

These four grievances were processed together under the grievance procedure set out in the master collective bargaining agreement, all the pertinent sections of which are set out below:

ARTICLE XIV—SETTLEMENT OF DISPUTES

14.1 All grievances or disputes concerning the application or interpretation of this Agreement shall be presented in writing by the aggrieved party to the designated representative of the other party within fifteen (15) days of the day the aggrieved party first had knowledge of the grievance or dispute, except as provided in Article IV and Article VI. Immediate consideration shall be given such matters and in the event of failure to promptly arrive at an adjustment satisfactory to both parties involved, the dispute shall be referred to the Joint Conference Board as hereinafter provided.

. . . .

14.3 It is the intention of the parties to this Agreement that all unresolved grievances or disputes between said parties must be settled by their submission to a Joint Conference Board or arbitration as hereinafter provided and that there shall be no interruption of work during said procedure.

14.4 The Joint Conference Board shall be composed of two (2) panel members designated by the Union and two (2) panel members designated by the Employer. No Employer-designated member shall be directly involved in the dispute, and no panel member designated by the Union shall be employed by the Union Local directly involved. By mutual agreement, the number of panel members may be reduced to one per party. The Joint Conference Board step may be waived by mutual agreement, in which case the grievance will be referred directly to Arbitration in accordance with Paragraph 14.5 below.

14.5 If the Joint Conference Board cannot resolve a question referred to it, the Board shall be dissolved and either party to the grievance may request the Federal Mediation and Conciliation Service to supply a list of 11 neutral Arbitrators residing in the Northwest from

which an impartial Arbitrator shall be selected to settle the matter. Any matter not referred by the aggrieved party to arbitration within thirty (30) calendar days after the dissolution of a Joint Conference Board shall be deemed to be untimely and the right to arbitration waived.

14.6 Neither the Arbitrator nor the Joint Conference Board shall have the power or authority to add to, subtract from, or modify the terms of this Agreement.

(All these provisions were repeated in Article 19 of the produce drivers supplemental agreement.)

At the Joint Conference Board meeting, the two union and two employer representatives agreed among themselves to the dovetailing of the three separate seniority lists. On August 9, 1982, the Board issued a written decision in which it explained the economic reasons why the separate seniority lists had to be merged in violation of the collective bargaining agreements. The decision also set out a detailed procedure by which the dovetailing would be implemented. See App. 23-24.

Glover filed this class action suit in federal district court on March 21, 1983, which is seven months and 12 days after the Joint Conference Board decision. Jurisdiction rested on 29 U.S.C. § 185, set out at App. 13. On June 8, 1983, this Court announced in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), that the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) would apply to appeals from grievance-and-arbitration proceed-

ings. On September 13, 1983, the district court denied Glover's motion to amend his complaint and granted defendants' motions to dismiss the complaint as barred by *DelCostello*. See App. 1. After Glover appealed, the Ninth Circuit, also relying on *DelCostello*, affirmed the dismissal. See App. 7.

ARGUMENT

The questions presented by this case raise important issues of federal labor law which should be resolved by this Court. Those issues concern the validity of the means by which modifications of collective bargaining agreements are made, and the opportunities afforded union members to challenge those modifications. These are areas of national concern.

This case presents a highly desirable vehicle to circumscribe the application of DelCostello to cases involving true "grievance" arbitration.[1] The Court needs to define the meaning of an "arbitration award"[2] to assist lower

---

1. " '[I]nterest' arbitration involves the settlement of the terms of a contract between the parties, whereas, in the more familiar 'grievance' arbitration, the subject is claimed violation or interpretation of the terms of an existing contract." School Committee of Boston v. Boston Teachers Union, 363 N.E.2d 485, 496 n.4 (Mass. 1977). Paragraph 14.6 of the collective bargaining agreement in this case precludes any "interest" arbitration.

2. A Joint Conference Board "decision" has the same force and effect as an "arbitration award." General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963). The terms are used interchangeably herein.

courts in determining when to apply the six month limitations period and this case presents that opportunity. This case presents the means by which to bridge some present gaps in the judicial procedure for individual union members to challenge the unauthorized modification of collective bargaining agreements by way of purported "arbitration awards" rendered in grievance proceedings unrelated to the modification.

Discussion

I. It is necessary for this Court to define what an "arbitration award" is for purposes of applying the limitations period on suits to vacate arbitration awards.

The differences between the objectives of Glover's original grievance and this lawsuit must first be understood in order to understand the nature of the "arbitration award" being challenged here. Thus, it is important at the outset to separate the various claims that Glover is asserting in his complaint and to deal with each one individually.

Glover's unfair representation claim against the union and its two representatives on the Joint Conference Board arises from the union's agreement to modify the seniority provisions of the collective bargaining agreement by dovetailing the separate seniority lists. This was done without authority, contrary to the union members' vote and contrary to the grievance provisions set out above.[3] Glover's

---

3. Furthermore, the dovetailing violated the union's by-laws requiring any modification of the collective bargaining agreement to be subject to a ratification vote of the union members.

claim for breach of the collective bargaining agreement against the employer is likewise based on the employer's implementation of the unauthorized and invalid dovetailing agreement in violation of the seniority provisions of the original collective bargaining agreement.

Glover's suit also seeks to have the court declare the modification of the seniority provisions of the collective bargaining agreements invalid. His prayer requests a restoration of the status quo ante of the seniority lists prior to the Joint Conference Board decision. App. 20. The dovetailing was purely gratuitous and irrelevant to the grievance submitted. In submitting a grievance, Glover sought only to have the collective bargaining agreement applied, not rewritten. The Joint Conference Board, after applying the agreement to the facts and awarding Glover damages for a violation, then decided the seniority provisions were inconvenient and proceeded to rewrite them in the body of its written decision.

This claim to have the modification declared invalid is not an appeal from the Board's "arbitration award." The award was to pay the employees, which was paid. The unauthorized modification of the collective bargaining agreement is not a legitimate part of the "award" simply because it was written on the same sheet of paper as the decision to award pay.

Glover requested the court to declare the modification invalid and of no legal effect because the collective bargaining agreement expressly denied the Board power to

modify its terms. If the modification is held invalid, it follows that job assignments made on the authority of the invalid modification are continuing violations of the collective bargaining agreements, with the result that this suit is not time barred.

Therefore, it follows that a judicial determination of the validity of the modification is a threshold issue which the lower courts ignored. *Cf. John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964) ("duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.") Instead, the trial court determined that the limitations period announced in *DelCostello* barred the suit before determining whether *DelCostello* was applicable. A comparison of the original grievance and this suit would have revealed that the issue in this suit—the validity of the dovetailing agreement—was never arbitrated. And indeed the issue could not have been arbitrated because (1) it was never submitted for arbitration—it did not even exist until the Joint Conference Board decision was written—and because (2) that kind of "arbitration," dealing with substantive modifications, was expressly foreclosed by the collective bargaining agreement's grievance and arbitration provisions.

Under these circumstances, it is necessary for this Court to define what an "arbitration award" is for purposes of applying *DelCostello*.

II. This court has not yet decided the important federal question of whether *DelCostello*'s six-month limitations period should apply to nonarbitrated claims.

Both of the lower courts misapplied *DelCostello* to this case. The cases are factually distinguishable. Furthermore, the policy reasons for imposing a six month limitations period are quite different in each case.

In *DelCostello* and in *United Steelworkers v. Flowers,* its companion case, the issues that were the subject of the lawsuits were the same as the ones in the grievance arbitrations. DelCostello's grievance was for being discharged. A joint union-management committee upheld the discharge. His lawsuit alleged that the employer had discharged him in violation of the collective bargaining agreement and that the union had breached its duty of fair representation in the grievance procedure. Flowers filed a grievance asserting the employer had violated the collective bargaining agreement by assigning certain welding jobs to employees in other job categories. The arbitrator ruled that the employer's job assignments were permitted by the collective bargaining agreement. The arbitrators in *DelCostello* and *Flowers* merely interpreted the collective bargaining agreements, they did not rewrite them. In contrast, the Joint Conference Board in this case used the grievance hearing as an opportunity to renegotiate the seniority provisions of the collective bargaining agreement. Consequently the major issue in this lawsuit—the validity of the dovetailing—is different from the ones presented in the

grievance.

Putting the different facts aside, there are two policy reasons why *DelCostello* is not, and should not be, applicable to nonarbitrated claims. First, the interests served in *DelCostello* by a six month limitations period are not served in this case. The short limitations period on challenging arbitration awards served the purposes of assuring finality and encouraging the rapid resolution of labor disputes. *DelCostello*, 103 S.Ct. at 2292. Both these policy considerations presume a decision settling a dispute after an opportunity for the parties to contest the issues. The dispute in this suit, however, over the validity of the dovetailing, could not and did not arise until the Joint Conference Board issued its decision. Consequently, there has been no opportunity to resolve the dispute until this suit was filed. *Cf. Hall v. Printing & Graphic Arts Union, Local 3,* 696 F.2d 494, 497 (7th Cir. 1982) (Plaintiff barred from challenging discharge where she had prior opportunity to do so). The concept of finality is inapposite here. It follows that finality and rapid resolution of labor disputes would not be impaired by not applying *DelCostello* to this case.

Second, this type of suit serves many important interests that would be hurt by a short limitations period. Allowing suits like this one in which union members are challenging the validity of substantive changes in their collective bargaining agreements effected under the disguise of arbitration would prevent abuse of the grievance procedure. A

short limitations period, on the other hand, would encourage such abuse. Union and management representatives could effect controversial changes to collective bargaining agreements simply by announcing them in Joint Conference Board decisions, without submitting them to a union vote (thereby circumventing the ratification requirements of union by-laws).

Furthermore, modifications could be implemented without notice to affected employees. In this case, the Joint Conference Board's decision, involving only four grievances, affects the seniority of all drivers, including dairy product drivers, not one of whom had filed a grievance. In *Clark v. Hein-Werner Corp.*, 8 Wisc.2d 264, 100 N.W.2d 317, 318 (1960), the court held that vested seniority rights under a collective bargaining agreement entitle the employees to notice of, and the right to participate in, any arbitration proceeding passing on such rights. It also held that once employees' rights become fixed in a collective bargaining agreement, the union does not possess the right to barter them away before an arbitrator. *Id. See also Primakow v. Railway Express Agency, Inc.*, 56 F. Supp. 413, 416 (E.D. Wisc. 1943). A six month limitations period to bar suits on behalf of employees who did not even have notice of the "arbitration" is very harsh.

The Ninth Circuit mistakenly believed this suit presents "exactly the kind of hybrid claim to which, in deciding *DelCostello*, the Supreme Court wished a uniform statute of limitations to apply." App. 11. The court, quoting *Del-*

Costello, said Glover's claim involves "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it." App. 11-12. The dovetailing, however, was accomplished not *under* the terms of the collective bargaining agreements but in direct violation of them. This suit challenges the dovetailing precisely because the way it was implemented circumvents the consensual processes that labor law is supposed to promote.[4]

Applying a short limitations period to prevent union members from challenging an abrogation of their seniority rights by way of an unauthorized "arbitration award" will hinder, not promote the formation of collective bargaining agreements. This suit does not amount "to a direct challenge to the private settlement of disputes under [the collective bargaining agreement]." *DelCostello*, 103 S.Ct. at 2291. Far from challenging the grievance and arbitration provisions of the collective bargaining agreement, this suit seeks to *enforce* them. *See Electrical Contractors Association v. Local 103, IBEW*, 458 F.2d 590, 592-93 (1st Cir. 1972) (policy favoring private settlement of labor disputes would be subverted if enforcement were granted Joint Safety Committee's arbitration "award" that was

---

4. There is no ripeness problem. This lawsuit was filed rather than another grievance because the latter would have been futile. See App. 20.

not the clearly chosen or intended instrument to settle dispute). In this case there was no agreement or intention on the part of union members to have their seniority be redetermined by arbitration. In fact, their vote of 33-3 is overwhelming evidence of precisely the opposite.

For the reasons set forth above, this Court should accept this case for review to determine whether *DelCostello* should apply to nonarbitrated claims.

III. The question of what limitations period to apply to nonarbitrated claims is an important question of federal labor law not yet decided by this Court.

The Ninth Circuit believed that if *DelCostello* was not applied retroactively to this case, the applicable statute of limitations was 20 days. See App. 8. Thus, *DelCostello* was applied to lengthen the limitations period to six months, which still had the effect of barring this suit. But if this Court agrees with Glover that this suit is not an appeal of an "arbitration award," see Arguments I and II supra at 6-13, then neither *DelCostello* nor Oregon's 20 day statute of limitations on suits to vacate arbitration awards should apply. It would then be necessary for this Court to characterize the nature of this suit in order to determine which suitable state statute of limitations should be borrowed. *See, e.g., Crowley v. Local 82, Furniture & Piano Moving*, 521 F.Supp. 614, 630-31 (D. Mass. 1981), *aff'd on other grounds*, 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds*, ____ U.S. ____, 104 S.Ct. 2557 (1984) (court applied six-year state statute of limita-

tions for breach of contract to suit against union for violating union constitution where remedies sought were quasi-contractual in nature).

CONCLUSION

The short six month limitations period that this Court, in *DelCostello*, made applicable to employees' suits seeking to vacate arbitration awards has now been applied to bar a claim that was never arbitrated. This step seriously undermines the important federal policy of providing a forum under § 301 to aggrieved employees. To define the meaning of an "arbitration award" and to define the circumstances when *DelCostello* is applicable and when it is not, this Court should grant our petition.

Respectfully submitted,

GARY JENSEN
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RICHARD L. GLOVER, on behalf of himself and all others similarly situated, Plaintiffs,	)	
v.	)	Civil No. 83-6105-ME
UNITED GROCERS, INC., an Oregon corporation; LOCAL #962 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CLIFFORD COOPER, Secretary-Treasurer; JACK ALEXANDER, LAYTHELL BALES, AL CARDER, and GREG NEWSTRAND, Representatives; Defendants.	)	OPINION AND ORDER

Gary K. Jensen, Attorney-at-Law
91 Madison Street
Eugene, Oregon 97402
Attorney for Plaintiffs

Nelson D. Atkin II
Richard N. Van Cleave
Spears, Lubersky, Campbell, Bledsoe, Anderson & Young
800 Pacific Building
520 S.W. Yamhill St.
Portland, Oregon 97204
Attorneys for Defendant United Grocers, Inc.

Richard R. Carney
Stephen H. Buckley
Carney, Buckley & Kasameyer
410 Riviera Plaza
1618 SW First Avenue
Portland, Oregon 97201
Attorneys for Defendants Teamsters Local No. 962, Clifford Cooper, Jack Alexander, and Laythell Bales

BELLONI, J:

In this action brought pursuant to § 301(a) of the Labor-Management Act as amended, 29 U.S.C. § 185, plaintiff alleges breach of duty of fair representation by defendants. Defendants are plaintiff Glover's employer (United Grocers), his union and its officials, and two persons who served as panel members on a joint conference board between the employer and the union. Plaintiff brings the action as a class action on behalf of roughly 36 individuals he alleges are similarly situated. His claim arises from defendants' decision to "dovetail" three seniority lists into one. Plaintiff alleges that this decision violated defendants' duty of fair representation and the provisions of the applicable collective-bargaining agreement.

Defendants moved to dismiss, relying on then current law that this action is governed by ORS 33.310. That statute provides for a twenty-day limitations period for labor disputes arising from the grievance and arbitration provisions of a collective bargaining agreement. *See Carpenters Local 1020 v. FMC Corp.*, 658 F.2d 1205 (9th

Cir. 1981).

During the pendency of these motions, the United States Supreme Court ruled that the applicable statute of limitations to § 301 actions is not the analogous state statute, but § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). *DelCostello v. International Brotherhood of Teamsters,* ____ U.S. ____, 103 S.Ct. 2281 (1983). Section 10(b) provides for a limitations period of six months.

In this case, the decision of the Joint Conference Board which gave rise to plaintiff's claim occurred on August 9, 1982. Plaintiff did not file his claim until March 21, 1983—seven months and twelve days thereafter. Accordingly, unless plaintiff can show some ground for tolling the limitations statute, his claim is time-barred.

Plaintiff has put forth three arguments in support of tolling the statute. He first claims that the Joint Conference Board decision did not become effective until August 22, 1982, citing two parts of the seven-part plan which had effective dates later than the date of decision. The other parts of the plan, however, do not specify effective dates and were apparently intended to come into force on the day the Board signed the decision. Plaintiff's contention, therefore, applies to only part of the plan and does not justify a finding that the entire decision should be construed according to the later date. I find that plaintiff does not state sufficient cause on this ground to toll the statute.

Plaintiff also relies on an exhaustion-of-administrative-

remedies theory. He claims that exhaustion of the administrative remedies available to him under the contract did not occur until at least September 28, 1982, and perhaps as late as December 20, 1982. On the first date, the Federal Mediation and Conciliation Services declined to institute arbitration; on the second, the union advised plaintiff that it would not participate in any arbitration proceeding.

I find that this contention is without merit. Under ¶ 14.5 of the Wholesale Grocery Master Agreement and ¶ 19.5 of the Wholesale Produce Agreement, plaintiff did not have a right to arbitration unless the Joint Conference Board deadlocked. In this case, the Board unanimously determined that plaintiff's employer had not violated the bargaining agreement and denied plaintiff's grievance. Under the terms of the contract, that decision was final and binding. Plaintiff exhausted his administrative remedies as of that Board decision on August 9, 1982.

Finally, plaintiff contends that the limitations period should have been suspended from November 12, 1982, to December 23, 1982, the period during which plaintiff's unfair labor practice complaint was pending before the National Labor Review Board (NLRB). Plaintiff bases his contention on the fact that federal courts abstain from jurisdiction over suits alleging a breach of fair representation while the proceedings are pending before the NLRB. Plaintiff cites in part *Ornellas v. Oakley,* 618 F.2d 1351 (9th Cir. 1980). Rather than support plaintiff's

argument for abstention, however, *Ornellas* provides that an aggrieved employee need *not* file with the NLRB before proceeding in federal court. *Id.* at 1355. The effect of NLRB proceedings on the limitations period was not at issue, nor even the issue of abstention. I find, therefore, that plaintiff's decision to pursue a remedy before the NLRB did not toll the statute of limitations. The availability of a remedy under the federal statute did not preclude maintenance of an action in federal court. *See West Coast Telephone Co. v. Local Union No. 77,* 431 F.2d 1219 (9th Cir. 1970).

Plaintiff claims that *DelCostello* should not be applied retroactively. This argument has no merit. The Supreme Court applied the six-months period retroactively, and remanded solely for further findings on possible cause to toll that period.

Plaintiff moves to amend his complaint in order to set forth the facts supporting his arguments for tolling the statute. Since I find that these arguments are untenable, the amendment would not serve any purpose.

Defendants' motion to dismiss (#3, #7) are GRANTED. Plaintiff's motion to amend (#12) is DENIED. Plaintiff's motion for certification of his class (#8) is moot.

DATED this 13th day of September, 1983.

/s/ Robert Belloni
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT L. GLOVER, etc., Plaintiff,	)	
	)	Civil No. 83-6105-ME
v.	)	
	)	JUDGMENT
UNITED GROCERS, INC., et. al, Defendants.	)	

This action is dismissed.

Dated: September 13, 1983.

Robert M. Christ, Clerk
by /s/ Dan Marsh, Deputy

APPENDIX C

Richard L. GLOVER, on behalf of himself and all others similarly situated, Plaintiffs-Appellants,

v.

UNITED GROCERS, INC., an Oregon corporation; Local 962 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Clifford Cooper, Secretary-Treasurer; Jack Alexander, Laythell Bales, Al Carder, and Gregg Newstrand, Representatives, Defendants-Appellees.

No. 83-4202.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 4, 1984.
Decided Nov. 8, 1984.

Gary K. Jensen, Gary K. Jensen, P.C., Eugene, Or., for plaintiffs-appellants.

Richard R. Carney, Stephen H. Buckley, Carney, Cornelius & Buckley, Portland, Or., Nelson D. Atkin, II, Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland, Or., for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN and SCHROEDER, Circuit Judges, and JAMESON,* District Judge.

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

PER CURIAM.

Richard Glover appeals the judgment dismissing as time-barred his class action, under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), for breach of contract and breach of the duty of fair representation. The district court applied the six-month statute of limitations set forth in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 2285, 76 L.Ed.2d 476 (1983), for hybrid contract/duty of fair representation actions. We affirm.

In 1981, the Supreme Court held that the applicable statute of limitations for an action against an employer, following an arbitration award, was the state statute of limitations for vacation of an arbitration award. *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 62, 101 S.Ct. 1559, 1563, 67 L.Ed.2d 732 (1981). At that time, this court applied the vacation of arbitration award limitation to actions against the union as well as actions against the employer. *Singer v. Flying Tiger Line, Inc.,* 652 F.2d 1349, 1353 (9th Cir. 1981). Glover's cause of action, which in effect follows an arbitration award, accrued on August 9, 1982. Oregon's limitation for vacating arbitration awards, Or.Rev.Stat. § 33.310, allowed twenty days for appeal. Under *Singer* that is the only statute of limitations upon which Glover could have relied in filing an action against either his employer or his union.

In 1983, we reviewed *Singer* and concluded that the same statute of limitations should not apply to the union

as to the employer. *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1047 n. 6, 1048 (9th Cir. 1983) (*McNaughton I) reh'g denied,* 722 F.2d 1459 (9th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 291, 82 L.Ed.2d ____ (1984). Instead, we applied the two year Oregon statute of limitations for malpractice actions to the claim against the union. *Id.* at 1049. Subsequently, *DelCostello*, borrowing from § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), adopted a six month statute of limitations for hybrid actions against unions and employers.

Despite appellant's protestations, we have no difficulty giving *DelCostello* retroactive application in this case. Where we have refused retroactive application in the past, its effect would have been to shorten the applicable state statute. *Barina v. Gulf Trading and Transp. Co.*, 726 F.2d 560, 563-64 (9th Cir. 1984); *McNaughton v. Dillingham Corp.*, 722 F.2d at 1461 (9th Cir. 1984)(*McNaughton II*); *Edwards v. Teamsters Local Union No. 36,* 719 F.2d 1036, 1040 (9th Cir. 1983), *cert. denied* ____ U.S. ____, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984). *See also, Scoggins v. Boeing Company, Inc.*, 742 F.2d 1225, 1227 (9th Cir. 1984). In the case before us, the cause of action accrued before *McNaughton I* abrogated *Singer, McNaughton I,* 707 F.2d at 1047, n. 6, when the applicable state statute for actions against both the union and the employer was twenty days. The retroactive effect of *DelCostello* is to lengthen, not shorten, the time in which Glover could have filed.

Application of *DelCostello* in this case also comports with the requirements set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), for gauging the appropriateness of retroactivity of statutes of limitation. *Id.* at 106-07, 92 S.Ct. at 355. We consider the first and third of these requirements together because they are closely related. Both are satisfied. Although *DelCostello* establishes a new principle of law and overrules precedent upon which litigants may have relied, Glover has not so relied to his detriment, as we have already noted. The change in the law thus works no inequity.

The second *Chevron* requirement is also satisfied; retroactive operation of the *DelCostello* rule in this case will further the rule's operation. Glover's situation does not exactly fit the *DelCostello* model in which the employer is alleged to have committed one wrong while the union has committed a separate, but related wrong. Rather, Glover alleges that the union and the employer have wronged him in joint violation of the collective bargaining agreement. He suggests that the facts in this case give rise not to a hybrid claim, but to a cause of action based solely on the collective bargaining agreement. We read *DelCostello* to apply not only when the gravamen of the action is breach of the duty of fair representation, but also to claims for alleged violations of the collective bargaining agreement. Moreover, we disagree with Glover's assessment of his own claim.

This is exactly the kind of hybrid claim to which, in deciding *DelCostello*, the Supreme Court wished a uniform statute of limitations to apply. *DelCostello* put to rest the proliferating cases in which the various district and circuit courts were applying a bewildering variety of local statutes of limitations to cases challenging the conduct of employers and unions with reference to labor grievances. By whatever nomenclature plaintiff's attorneys captioned their claims, these cases usually involved two complaints: (1) the employer had acted contrary to the bargaining agreement in making some personnel decision, and (2) the union either had acted contrary to the agreement or had violated the worker's § 301 rights in failing to prosecute the worker's grievance to the worker's satisfaction.

The waste of time and resources in pursuing these claims under an almost infinite variety of local limitations statutes, and the spectacle of workers pursuing nonexistent remedies against the union when the same grievance against their employer was time-barred, had vexed the courts for some time. *DelCostello* gave the Supreme Court the opportunity to pull all these cases together under one well-known statute of limitations that had long been recognized by the labor-law bar.

Glover's claim mirrors elements of other cases which the Supreme Court examined before concluding that for hybrid claims the same statute of limitations should apply to employers as to unions. Glover's claim involves, "those consensual processes that federal labor law is chiefly

designed to promote—the formation of the collective agreement and the private settlement of disputes under it." *DelCostello*, 103 S.Ct. at 2289, quoting *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). It involves a claim against the employer which is "inextricably interdependent" with the claim against the union. *DelCostello*, 103 S.Ct. at 2290, quoting *Mitchell*, 451 U.S. at 66-67, 101 S.Ct. at 1565-66. Finally, it is a claim on which "[t]he employee, may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 103 S.Ct. at 2291.

Not to apply *DelCostello* in Glover's instance would be to thwart its clear purpose in making uniform the statute of limitations applied to employers and to unions when the claim is at once for breach of duty of fair representation and for breach of contract. Glover's claim is just such a claim.

Affirmed.

APPENDIX D

LABOR-MANAGEMENT RELATIONS ACT § 301,
29 U.S.C. § 185

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents

are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RICHARD L. GLOVER, on behalf of himself and all others similarly situated, Plaintiffs, vs. UNITED GROCERS, INC., an Oregon corporation; LOCAL #962 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CLIFFORD COOPER, Secretary-Treasurer, JACK ALEXANDER, LAYTHELL BALES, AL CARDER, and GREGG NEWSTRAND, Representatives, Defendants.	Civil No. 83-6105-ME COMPLAINT (Contract—Breach of Duty of Fair Representation) CLASS ACTION Demand for Jury Trial

This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce and for breach of the duty of fair representation. Jurisdiction of the Court is conferred under Section 301(a) of the Labor-Management Relations Act as amended, 29 U.S.C. § 185.

CLASS ACTION ALLEGATIONS

This action is brought on behalf of the Plaintiff, Richard Glover, and on behalf of each and all other persons similarly situated, numbering approximately 36 individuals. These persons constitute a class so numerous as to make it impracticable to bring them all before the

Court, pursuant to Fed. R.Civ.P. 23(A)(1), (2), (3), and (4) and 23(b)(1)(B) and (2). There are common questions of law and fact affecting the rights of the Plaintiff and the class represented by him, and common relief is sought. The claims of the Plaintiff are typical of the claims of the class. The individual Plaintiff seeks to enforce a right in favor of such class, and the interest of Plaintiff is such as to insure the adequate representation of all members of said class. The questions of law and fact to be determined are whether or not the Defendants breached the Collective Bargaining Agreement as well as whether or not the Defendants, Union, its officers and representatives, breached their duty of fair representation and, therefore, what amount of damages were suffered by the Plaintiffs.

All of the Plaintiffs are or were employed by United Grocers, represented by Local #962, and who were drivers affected by the seniority lists involved in the case.

The Defendants have acted on grounds generally applicable to the class, thereby making appropriate relief with respect to the class as a whole.

Furthermore, the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications.

I

Plaintiffs are and were at all times material herein, employees of United Grocers, Inc., an Oregon corporation hereinafter referred to as "the Employer," and members of Local #962, Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as "the Union," and are and were subject to collective bargaining agreements between the Employer and the Union.

II

The Defendant Union is a labor organization in an industry affecting commerce within the meaning of Section 301 of the Labor-Management Relations Act, and is and was engaged in representing its employee members within the State of Oregon.

III

The Defendant Employer is a corporation incorporated under the laws of the State of Oregon, and is located in Medford, Jackson County, Oregon. Defendant Employer is and was engaged in an industry affecting commerce within the meaning of Section 301 of the Act.

IV

The Defendant Union, Local #962, as the exclusive collective bargaining representative of the above described employees, on behalf of them, entered into four collective bargaining agreements with the Employer, covering the time period of July 6, 1980, through July 9, 1983, true

copies of which are attached hereto. The collective bargaining agreements were entered into by Defendant Union for the benefit of the employee members of the bargaining units and Plaintiffs, as members thereof, are entitled to enforce the contract provisions.

V

Each agreement contains a provision relating to seniority, to the effect that each of the three employer groups, namely: produce warehousemen, grocery drivers and dairy drivers, shall have and maintain a separate seniority list. (See paragraph 1.1 of the Driver's Supplemental Agreement to the Wholesale Grocery Master Agreement, paragraph 1.1 of the Dairy Products Supplemental Agreement to the Wholesale Grocery Master Agreement, and paragraph 7.1 of the Wholesale Produce Agreement.)

While the Collective Bargaining Agreements were in full force and effect, the Defendant Employer requested the Union to merge or dovetail the three separate seniority lists into one new list, which request was relayed to the Union and a special meeting was scheduled for January 10, 1982. At that meeting of January 10, 1982, all of the affected employees present voted 33 to 3 to oppose any dovetailing of the separate seniority lists under each collective bargaining agreement.

VI

Thereafter, Plaintiff and others filed grievances to protest the Employer having sent produce warehousemen

to drive mixed loads of produce, grocery and dairy goods. Those grievances proceeded to a joint conference board which consisted of two representatives of the Employer, Defendants, Al Carder and Gregg Newstrand; and two representatives of the Union, Defendants, Jack Alexander and Laythell Bales, the latter two having been obtained from Joint Council #37, Portland, Oregon.

VII

At the joint conference board meeting, the Union representatives agreed with the Employer representatives to the dovetailing of the three separate seniority lists, although that issue was totally unrelated to the subject of the grievance. This decision of August 9, 1982, affected all three groups of employees despite the fact that one group, the dairy drivers, was not a party to the grievance. The decision was furthermore in violation of paragraph 14.6 of the Wholesale Grocery Master Agreement, and paragraph 19.6 of the Wholesale Produce Agreement which states that "neither the Arbitrator nor the Joint Conference Board shall have the power or authority to add to, subtract from, or modify the terms of this agreement."

In so acting, the Union representatives wilfully breached their duty of fair representation to the Plaintiffs, and each and every member of the joint conference board acted to breach all four of the collective bargaining agreements in dovetailing the seniority clauses.

VIII

Plaintiffs sought to continue the grievance process to arbitration, but were prevented from doing so because the Union through Defendant, Secretary-Treasurer, Clifford Cooper, refused to act as a party to such arbitration proceeding. Any further attempts to remedy this situation through contractual procedures are futile.

IX

As a result of the action of the Defendants, United Grocers, Inc., and the Union, Plaintiffs and each of them have suffered and continue to suffer great financial harm through the dovetailing of the seniority lists.

WHEREFORE, Plaintiffs pray for judgment against the Defendants and each of them for the Plaintiffs' lost wages; further for restoration of the status quo ante of the seniority lists prior to the Joint Conference Board decision; further for the sum of $50,000.00 as punitive damages against each of the Defendants; and for Plaintiffs' costs and disbursements incurred herein.

GARY K. JENSEN, P.C.

By: /s/
Gary K. Jensen—OSB #67055
Attorney for Plaintiffs

[Note: The lengthy collective bargaining agreements attached to the complaint are omitted here. However, all the pertinent provisions are set out in this petition, supra.]

APPENDIX F

TEAMSTERS LOCAL UNION NO. 962
MEDFORD , ROSEBURG, KLAMATH FALLS
MEMBER'S GRIEVANCE REPORT

Date: 6-7-82 (this report)

1.) Name of Complainant: *Richard L. Glover*
Home phone number: *772-9403*

2.) Name of Employer: *United Grocers*
Phone Number: *773-7383*

3.) Nature of Report (Member should record here in detail the nature of the matters which he desires to report, supplying all pertinent dates, names and places):

On 5-26-82 Harvey Heuner took Combo Load — Grocery, Produce, Milk, to Yreka, Fort Jones, Etna, Calif.

There was more grocery than produce, about 40 cubes more, so I feel this should have been a load for a grocery driver.

(Use additional sheets of paper or reverse side of this form, if needed)

4.) Please attach any clock charts, check stubs, time records, or any other material pertinent to this grievance.

5.) In your opinion on what basis should this grievance be settled?

Payed for above run.

/s/ Richard L. Glover
Member's signature

APPENDIX G

JOINT CONFERENCE BOARD DECISION

This Joint Conference Board has been called to resolve grievances filed by John Ensley, Steve Buchanan, Richard Glover and Pete Sikes, who are employees of United Grocers, Inc., Medford, Oregon, and working under Labor Agreements between United Grocers, Inc. and Teamster Local No. 962.

The Grievants claim that they are entitled to lost pay, because they were not properly dispatched in accordance with the seniority provisions and practices of their Labor Agreements.

United Grocers, Inc. and Teamster Local No. 962 are parties to the following Labor Agreements:

(1) Wholesale Produce Agreement;

(2) Wholesale Grocers Master Agreement—Dairy Products Drivers Supplemental Agreement;

(3) Wholesale Grocers Master Agreement—Drivers Supplemental Agreement.

It has been the past practice that drivers in the Medford area under each of the above named three Agreements have had separate seniority lists. Therefore, there have been separate seniority lists for (1) produce drivers, (2) milk drivers and (3) grocery drivers.

The grievances now before this Joint Conference Board are, in general, to the effect that the employer has dispatched drivers with seniority on one list to operate runs

carrying products for which drivers on another seniority list have preference. It is the contention of the employer that the employer, in order to service its customers, has been required to merge and mix the type of loads which are being carried, and that it would be ineffectual, if not impossible, to dispatch trucks separate under each of the three above mentioned Labor Agreements. It is, therefore, the employer's position that, since the types of loads have been mixed and merged, the seniority lists for the drivers employed under the three Agreements with Teamster Local No. 962 should also be merged in order to spread the available work equitably among all of the drivers on the various seniority lists.

It is the decision of the Joint Conference Board that the produce seniority list and the milk drivers seniority list and the grocery drivers seniority list for the employer, United Grocers, Inc. at its Medford Division, be merged and dovetailed so that each driver's position on the merged seniority list is in sequence in accordance with the driver's date of hire with the employer at its Medford Division.

This decision shall be implemented as follows:

1. Employees in the produce department shall have two (2) weeks from the date of this decision to exercise their seniority, if qualified, to claim a driving job rather than a warehouse job. After that time, produce department warehouse employees will have no seniority rights as drivers.

2. A new seniority list shall be prepared which will

merge and dovetail the produce, the dairy and the grocery drivers in sequence of "company seniority," that is, the date on which the employee was placed on the seniority roster.

3. There shall be separate seniority lists for produce department warehouse and for grocery warehouse.

4. Any employee who is hired as a driver after the date of this decision shall be placed at the end of the new seniority list.

5. All drivers may be assigned by the employer any type of load without regard to its content as grocery, milk or produce.

6. In order to equalize conditions between the drivers, all drivers will work under terms and conditions of the Drivers Supplement of the Wholesale Grocery Agreement. This shall become effective August 22, 1982.

7. Based on the fact of these cases, the money claims of the union shall be upheld and there shall be no other money claims awarded pertaining to this decision.

Dated August 9, 1982.

/s/ Jack Alexander
/s/ Laythell J. Bales
/s/ Gregg G. Newstrand
/s/ Alvin Carder

Supreme Court, U.S.
FILED
APR 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1257 (2)

In the Supreme Court of the United States

OCTOBER TERM 1984

RICHARD L. GLOVER, on behalf of himself and all others similarly situated,

Petitioner,

v.

UNITED GROCERS, INC., an Oregon Corporation, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT UNITED GROCERS, INC. OPPOSING THE PETITION

JAMES H. CLARKE
800 Pacific Building
520 S.W. Yamhill Street
Portland, OR 97204
Telephone: (503) 226-6151
Counsel for Respondent
UNITED GROCERS, INC.

NELSON D. ATKIN II
SPEARS, LUBERSKY, CAMPBELL, BLEDSOE, ANDERSON & YOUNG
of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 4-85

BEST AVAILABLE COPY

9 pp

QUESTION PRESENTED

Does the six months limitation period adopted in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), apply to a hybrid case for alleged breach of contract and breach of the duty of fair representation in which plaintiff seeks to vacate a decision of a contractually-created Joint Conference Board?

TABLE OF CONTENTS

	Page
Question Presented	i
Statement of the Case	1
Reasons for Denying the Petition	2
Conclusion	4

TABLE OF AUTHORITIES

Page

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 2

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 3

STATEMENT OF THE CASE

Petitioner's claims, as discussed in the Petition, are irrelevant to the actual question presented by this case.

The following are the relevant facts.

1. The Joint Conference Board decision which Petitioner seeks to vacate was issued August 9, 1982 and became effective August 22, 1982 (see Pet. App. 23-24).

2. Following that decision, Petitioner pursued arbitration of his grievance. However, under the collective bargaining agreement, Petitioner was not entitled to arbitration unless the Joint Conference Board deadlocked, and it had not done so. Consequently, on September 28, 1982, the Federal Mediation and Conciliation Service declined to institute arbitration. [1] Petitioner's administrative remedies under the contract were exhausted on August 9, 1982 (*see* District Court Opinion, Pet. App. 3-4).

3. Following the Joint Conference Board decision, Petitioner filed an unfair labor practice charge with the National Labor Relations Board (NLRB) seeking relief from that decision. This charge was pending from November 12, 1982 to December 23, 1982. The pendency of this unfair labor practice charge did not

---

[1] On December 20, 1982, the union advised Petitioner that it would not participate in any arbitration.

preclude maintenance of an action in federal court. (*see* District Court Opinion Pet. App. 4-5).

4. Petitioner filed this action in federal district court on March 21, 1983, which was seven months and twelve days after the Joint Conference Board decision (Pet. App. 4).

REASONS FOR DENYING THE PETITION

Petitioner brought his original claim for alleged breach of his contract seniority rights. His claim was heard by the Joint Conference Board which was part of the grievance and arbitration procedure provided in the collective bargaining agreement negotiated by Petitioner's union representative. The Joint Conference Board did not give him the relief he sought. The Joint Board upheld the employer's action and directed the seniority lists to be dovetailed to avoid future disputes (Pet. App. G).

1. Because this action was filed more than six months after the effective date of the Joint Conference Board decision, it was dismissed as time-barred based on the statutory six months limitation period applied by this Court in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), to actions which effectively vacate arbitration awards. Petitioner claims that his case should be heard because the Court has never decided whether or not such a Joint Board decision should be treated as an arbitration award. Petitioner's contention is erroneous.

In both *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981) and *DelCostello* v. *Teamsters*, *supra*, plaintiffs brought their actions following dissatisfaction with the results of Joint Board hearings, which under the respective collective bargaining agreements were final and binding. In both cases plaintiffs sought to vacate the awards of joint panels which had upheld their discharges. Although the Court in *DelCostello* mooted *U.P.S.* v. *Mitchell* and applied the six month statute of limitations in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) to hybrid actions for breach of contract and breach of the duty of fair representation, it did not criticize the characterization of a Joint Board decision as the equivalent of an arbitration award. The Court then remanded *DelCostello* for further proceedings, consistent with the application of the six month statute of limitations.

2. Petitioner also claims that policy reasons make the six months limitation period inapplicable to non-arbitrated Joint Board decisions. Petitioner's policy arguments are insubstantial. Petitioner theorizes that such a "short" limitation period would allow union and management representatives to make changes in collective bargaining agreements which affect employees not involved in the grievance. However, most, if not all, grievance resolutions affect employees not involved in the particular grievance. Grievances and awards over contract interpretations invariably dictate how the terms of the contract will be applied to other employees.

A discharge grievance which results in reinstatement leads to the layoff or termination of a replacement. If Petitioner's argument were accepted, grounds would exist to undercut the *DelCostello* rule in every case.

Petitioner also speculates that contract modifications resulting from Joint Board action can be implemented without notice to affected employees, and the "short" six months limitation period might expire before the employees can take action. Such a situation did not, however, exist in this case. Petitioner had notice of the Joint Board action and sought relief through contract procedures and from the NLRB. Although these actions did not have the result which Petitioner desired, Petitioner did not immediately bring this action. That delay does not call into question the decision of the district and circuit courts applying the six months limitation period.

CONCLUSION

The action of the lower courts in characterizing this suit as the kind of hybrid claim to which *DelCostello* applies a uniform six months limitation period was correct. The petition presents nothing for review and should be denied.

Respectfully submitted,

JAMES H. CLARKE
Counsel for Respondent
UNITED GROCERS, INC.

Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1257

In the Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD L. GLOVER, on behalf of himself and all others similarly situated,

Petitioner,

v.

UNITED GROCERS, INC., an Oregon corporation; LOCAL NO. 962 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CLIFFORD COOPER, Secretary-Treasurer; JACK ALEXANDER; LAYTHELL BALES; AL CARDER and GREGG NEWSTAND, Representatives,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT TEAMSTERS, CLIFFORD COOPER, JACK ALEXANDER and LAYTHELL BALES

RICHARD R. CARNEY
CARNEY, BUCKLEY, KASAMEYER & HAYS
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201
Telephone: (503) 221-0611

Counsel of Record for Local No. 962 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Clifford Cooper, Jack Alexander and Laythell Bales.

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 485

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Court of Appeals properly apply the six-month statute of limitations announced in DelCostello v. International Brotherhood of Teamsters, infra, to this case where it was alleged that a Joint Conference Board, consisting of an equal number of union and employer members, improperly modified the seniority provisions of the collective bargaining agreements, by dovetailing seniority lists, after the Employer had changed its method of operations?

TABLE OF CONTENTS

	Page
Question Presented	i
Statement of the Case	1
Summary of Argument	5
Argument	
A. Petitioner's Complaint Alleges a Breach of the Duty of Fair Representation and is Controlled by the DeCostello Decision	8
B. The Petition Does Not Warrant Review by the Supreme Court	13
Conclusion	15

TABLE OF AUTHORITIES

Pages

Cases:

Baker v. Newspaper and Graphic Communications Union, Local No. 6, et al, 628 F2d 156, (DC Cir 1980) 12

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) passim

Ekas v. Carling National Breweries, et al, 602 F2d 664 (4th Cir 1979) cert den 444 U.S. 1017 (1980) 12

Ford Motor Company v. Huffman, 345 U.S. 330 (1953) 7, 11

Humphrey v. Moore, 375 U.S. 335 (1964) 7, 12

I.L.W.U. v. Kuntz, 334 F2d 165 (9th Cir 1964) 13

Statutes:

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) 8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1257

RICHARD L. GLOVER, on behalf of himself and all others similarly situated,
Petitioner,

v.

UNITED GROCERS, INC., an Oregon corporation; LOCAL NO. 962 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CLIFFORD COOPER, Secretary-Treasurer; JACK ALEXANDER; LAYTHELL BALES; AL CARDER and GREGG NEWSTAND, Representatives,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT TEAMSTERS, CLIFFORD COOPER, JACK ALEXANDER and LAYTHELL BALES

STATEMENT OF THE CASE

Respondent United Grocers, Inc. (hereinafter the "Employer") and

Respondent Local No. 962 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union") were parties to four collective bargaining agreements covering the Employer's work force in Medford, Oregon. There was a master collective bargaining agreement known as the Wholesale Grocery Master Agreement and three supplemental agreements, which covered grocery drivers, dairy drivers and produce warehousemen. The collective bargaining agreements had provisions concerning seniority and provided that there would be separate seniority lists for grocery drivers, dairy drivers and produce warehousemen. (Pet. App. E-17 and 18). Petitioner was employed by the Employer as a grocery driver and covered by the terms and conditions of the collective bargaining agreements.

While the collective bargaining agreements were in effect, the Employer changed its operation and began shipping mixed truck loads of groceries, produce and dairy goods. The Employer requested permission from the Union to merge or dovetail the three seniority lists into a single seniority list. The affected employees were opposed to the dovetailing of the seniority lists. (Pet. App. E-18, G-22 and 23).

Petitioner subsequently filed a grievance alleging that the Employer had violated the seniority provisions of the collective bargaining agreements when it sent a produce warehousemen, instead of himself, to deliver a mixed load of produce, groceries and dairy goods. In accordance with the grievance procedures of the collective bargaining agreements, the grievance was referred to a Joint

Conference Board which consisted of two panel members designated by the Employer and two members designated by the Union. (Pet. App. E-19).

On August 9, 1982, the Joint Conference Board issued a written decision and unanimously determined that the three seniority lists should be merged into a single seniority list because of a change in the Employer's operations. (Pet. App. E-19 and G-22-24). Under the terms of the collective bargaining agreements, the unanimous decision of the Joint Conference Board was final and binding and could not be appealed further. (Pet. p 3-4, ¶ 14.5).

On March 21, 1983, seven months and twelve days after the final and binding decision of the Joint Conference Board, Petitioner filed this case and alleged that the Employer had violated the

collective bargaining agreements by the merging of the seniority lists and the Union had breached its duty of fair representation by allowing the Employer to merge the seniority lists. (Pet. App. E-15 and 19).

The Employer and the Union filed separate motions to the dismiss the complaint on the ground that it was barred by the statute of limitations. The District Court granted the Employer's and Union's motions to dismiss and the Ninth Circuit Court of Appeals affirmed the District Court.

SUMMARY OF ARGUMENT

Petitioner filed this action in the District Court and it was dismissed on the ground that it was an action for breach of the duty of fair representation and not timely filed within the six-month

limitation period announced by this Court in DelCostello v. International Brotherhood of Teamsters, 462 US 151 (1983). The Court of Appeals for the Ninth Circuit affirmed and the only issue argued by Petitioner was whether the DelCostello rule should be applied retroactively. In this Petition, it is claimed for the first time that the Petitioner's action was not an action for the breach of the duty of fair representation, or a suit to vacate an arbitration award, but instead was some new undefined cause of action in which it will "be necessary for this Court to characterize the nature of this suit in order to determine which suitable state statute of limitations should be borrowed." (Pet. p. 13).

The Petitioner contends that this action is unique because it "concerns the validity of the means by which

modifications of collective bargaining agreements are made, and the opportunities afforded union members to challenge those modifications." (Pet. p. 5). The Petitioner's contentions have been fully answered by this Court in Ford Motor Company v. Huffman, 345 US 330 (1953); Humphrey v. Moore, 375 US 335 (1964) and subsequent decisions of Court of Appeals, all of which have held that a labor organization, as a bargaining representative, has the power to amend existing labor agreements and such action is not a violation of its duty of fair representation so long as such change is made in good faith and with honesty of purpose in the exercise of its discretion. If there is no violation by the union of good faith, there is no breach of the duty of fair representation. If there is such a breach, a violation of the duty of fair

representation occurs and the six-month statute of limitations of DelCostello applies. Thus, the Petitioner's complaint involved a claimed breach of the duty of fair representation and no new cause of action has been presented.

ARGUMENT

A. Petitioner's Complaint Alleges a Breach of the Duty of Fair Representation and is Controlled by the DelCostello Decision.

The question posed by this Petition for a Writ of Certiorari is what statute of limitations should govern this case. The question was answered by the Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. at 169-71, where the Court held that the six-month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b)

was the appropriate statute of limitations to be applied when it is alleged that a union has breached its duty of fair representation. Petitioner's complaint, which was filed seven months and twelve days after his cause of action accrued, is time barred by the six-month statute of limitations adopted for hybrid breach of contract/fair representation cases in the DelCostello decision.

In this Petition, it is alleged for the first time that Petitioner's cause of action against the Union is not governed by the DelCostello decision. In the lower courts, Petitioner characterized his claim against the Union as a suit for the breach of the duty of fair representation. In the District Court, the Petitioner argued that his cause of action was tolled by the filing of an unfair labor practice charge with the

National Labor Relations Board and therefore, the six-month statute of limitations set forth in DelCostello had not run at the time the lawsuit was filed. (Pet. App. A-3). In the Court of Appeals, Petitioner's only argument was that the DelCostello decision should not be applied retroactively. (Pet. App. C-9).

Petitioner now apparently contends that his suit is not properly characterized as a breach of the duty of fair representation, or a suit to vacate an arbitration award, but rather is a new undefined cause of action for the improper modification of a labor agreement for which a new statute of limitations must be adopted. (Pet. p. 13).

A review of Petitioner's complaint reveals his sole theory against the Union was for breach of the duty of fair representation. The complaint carries this

caption and allegations that the Union breached its duty of fair representation can be found throughout the complaint. (Pet. App. E-15 and 19).

A review of the DelCostello decision indicates the Supreme Court intended to adopt a uniform statute of limitations that would apply to all breach of contract/fair representation cases. The allegations in Petitioner's complaint, that the Employer and Union improperly modified the collective bargaining agreements by merging or dovetailing separate seniority lists, are properly characterized as a fair representation claim against the Union.

In Ford Motor Company v. Huffman, 345 U.S. 330 (1953), the union agreed to amend a labor agreement and thereby granted enhanced seniority rights to a particular group of employees which

resulted in layoffs to other employees. This Court held the union did not breach its duty of fair representation because the action was taken in good faith and with honesty of purpose. 345 U.S. at 338.

In Humphrey v. Moore, 375 U.S. 335 (1964) a Joint Area Committee merged separate seniority lists and this Court followed the Ford decision and held the action was proper and the union did not breach its duty of fair representation.

This Court's decisions in the Ford and Humphrey cases have been followed in a number of Court of Appeals cases. See, e.g. Baker v. Newspaper and Graphic Communications Union, Local No. 6, et al, 628 F2d 156 (DC Cir 1980) (merger of two printing crafts at a newspaper); Ekas v. Carling National Breweries, et al, 602 F2d 664 (4th Cir 1979) cert den 444 U.S. 1017 (1980) (merger of seniority lists when two

plants merged) and I.L.W.U. v. Kuntz, 334 F2d 165 (9th Cir 1964) (modification of seniority rosters).

In summary, regardless of how Petitioner now characterizes his cause of action, the gravamen of his complaint is that certain seniority lists were improperly merged. Under prior Supreme Court precedent, these allegations state a claim for the breach of the duty of fair representation. Petitioner's complaint is governed by the six-month statute of limitations adopted by this Court in DelCostello and was properly dismissed by the lower courts.

B. The Petition Does Not Warrant Review by the Supreme Court.

This case does not meet any of the important considerations the Supreme Court normally relies upon when deciding which

petitions for a Writ of Certiorari should be granted for the following reasons:

1. This case has not created a conflict among the Circuits;

2. There has been a very limited record developed in this case. Since the trial court granted the Employer's and Union's motions to dismiss, the record is limited to the Petitioner's complaint and several exhibits that were attached to the complaint;

3. The argument now advanced by Petitioner, that the DelCostello decision does not govern this case, was not raised in the District Court or the Court of Appeals, and

4. This case has no national significance or interest because the national policy favoring the rapid resolution of labor disputes has been set at six-months by this Court in

DelCostello. Even if Petitioner's claim involves some new cause of action, the statute of limitations should still be the six-month period adopted in the DelCostello decision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Richard R. Carney
CARNEY, BUCKLLEY,
KASAMEYER & HAYS
1618 SW First - Suite 410
Portland, Oregon 97201
Counsel of Record for
Local No. 962 of The
International Brotherhood
of Teamsters, Chauffeurs,
Warehousemen and Helpers
of America,
Clifford Cooper,
Jack Alexander and
Laythell Bales